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No. 73-757

In the Supreme Court of the United States

OCTOBER TERM, 1973

STUART LEVINE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Washington, D.C. 20530.

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Petitioner contends that he was denied effective assistance of counsel; that the evidence was insufficient to support his conviction; that the court failed to instruct on an essential element of one offense; and that the method of selection of grand and petit juries in the Southern District of Florida is unconstitutional.

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiracy to import, possess, and distribute marihuana, and of aiding and abetting another in carrying a firearm unlawfully during the commission of a felony, in violation of 21 U.S.C. 846 and 963, and 18 U.S.C. 2 and 924(c)(2).[1] He was sentenced to im-

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[1]Co-defendants Robert D'Orsay and Louis H. Chippas were also convicted in the joint trial. See petitions for writs of ceritorari in *D'Orsay* v. *United States*, No. 73-5288, certiorari denied, December 3, 1973, and *Chippas* v. *United States*, No. 73-761 (filed November 12, 1973), in which we have filed a brief in opposition.

prisonment for concurrent terms of four years and one year, to be followed by two years' special parole; he was also fined $15,000. The court of appeals affirmed without opinion (Pet. App. A).

In 1972, agent John Stevenson of the Bureau of Narcotics and Dangerous Drugs and Juan Ortiz, an informant, worked undercover in the investigation of narcotics traffic by making themselves available as pilots (Tr. 72, 73). On May 20, 1972, Ortiz and co-defendant Chippas met at the Miami International Airport and looked over some DC-3 and Lockheed Lodestar airplanes (Tr. 79-80). Three days later, Ortiz and agent Stevenson met co-defendant D'Orsay at the airport motel coffee shop. After Ortiz introduced Stevenson as his co-pilot on the trip, they discussed in detail the use of a Lockheed Lodestar to transport a load of marihuana from Jamaica to Leesburg, Florida (Tr. 84, 85).

D'Orsay said that Ortiz and Stevenson would not be able to make contact with Chippas in Jamaica, but that Chippas would recognize their yellow Lockheed Lodestar when it landed in Jamaica. He also said that sometime after 6:30 p.m. that evening Chippas would call petitioner, who would advise Stevenson, through D'Orsay and Ortiz, when and where to go in Jamaica (Tr. 90-91). D'Orsay would then meet Ortiz and Stevenson and give them final instructions and the money to rent the airplane and to pay for gas and expenses (Tr. 91-92). Petitioner had gone to the bank that day to cash checks so the money would be available when Ortiz and Stevenson got the word to go (Tr. 92). D'Orsay said that he would give them a package containing a Beretta pistol which belonged to petitioner and which petitioner would want back at the end of the transactions (Tr.

89-90, 92-93).[2] After the discussion, the three men left the coffee shop and D'Orsay went to a car and got out a paper bag containing a Beretta pistol and a number of garbage bags, and gave them to Ortiz (Tr. 92-93).

On May 24, 1972, Ortiz and Stevenson met with D'Orsay and petitioner at the same coffee shop and Stevenson was introduced to petitioner as John, the co-pilot. D'Orsay stated that Chippas had called him that morning and expected Ortiz and Stevenson to fly to Kingston, Jamaica at 1:00 p.m. that day to pick up the load (Tr. 125-127). On the way out of the coffee shop, petitioner called Ortiz aside and they went into the bar for a few minutes. Ortiz had been searched before the meeting and found to have only $50. He was not out of Stevenson's sight after the search except when he went into the bar with petitioner. After the meeting broke up, Ortiz took 19 $100 bills out of his pocket and gave them to Stevenson. (Tr. 128-132).

Ortiz and Stevenson flew to Kingston that day, arriving about 11:30 p.m. (Tr. 135). The next day Chippas approached Stevenson and Ortiz at the airport and the men went to Chippas' motel room (Tr. 136, 140). While there, Chippas spoke of future narcotics deals, and stated that petitioner was in another business and that he used petitioner's clean name to front for his activities, that he paid petitioner very well for this and that petitioner liked the money (Tr. 144-147). Arrangements were made to load the marihuana at the Kingston International Airport.

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[2]It was stipulated at trial that petitioner was the registered owner of the gun and that prior to coming into the hands of petitioner, this gun had been shipped by the J.A. Galif Co. of New York to the Tamiami Gun Shop in Miami in September 1967 (Tr. 217-218).

The following day, Chippas obtained the marihuana and headed back to the airport (Tr. 154-155, 342, 316-317, 347). Jamaican police seized the truck which contained 27 burlap bags (Tr. 299-302), including two which contained marihuana (Tr. 330, 334-335, 338), and arrested Chippas (Tr. 159).

1. Petitioner's contention that he was denied effective assistance of counsel was raised for the first time in an untimely petition for rehearing which the court of appeals denied (Pet. App. D). Since the issue was not timely raised and the facts alleged have not been developed on the record, petitioner's proper remedy is a motion in the district court under 28 U.S.C. 2255. Cf. *Lawn* v. *United States,* 355 U.S. 339, 362, n. 16.

In any event, petitioner's contention is without merit. Petitioner retained Mr. Grusmark to represent him shortly after the indictment was returned on June 22, 1972; he had ample time to engage other separate counsel prior to the trial date of August 21, 1972. He subsequently retained Mr. Kessler to represent him at trial, and Kessler alone was his attorney during trial (Tr. 44-45; Pet. App. E, paragraph 3; Pet. App. F, paragraph 3). Grusmark did not enter an appearance for petitioner at trial (Tr. 45). Kessler had available to him the results of all the pre-trial motions which Grusmark had made on petitioner's behalf. Kessler did not request a continuance, and there is no basis for concluding that he was not able adequately to prepare for trial. See *United States* v. *Lacy,* 446 F. 2d 511 (C.A. 5).

Petitioner argues that Kessler was in fact only an assistant to Grusmark, and that the latter made the ultimate decisions for petitioner as well as his two co-defendants. He further argues that Grusmark could not adequately

represent him because of the conflict of interest resulting from his representation of the other two defendants. But Grusmark was not petitioner's attorney at trial, and there is no showing that Kessler's decisions at trial reflected anything other than his best professional judgment regarding the conduct of petitioner's defense. Since petitioner was represented by retained counsel, he must make an especially strong showing before it could be concluded that he had been denied effective assistance. See *United States ex rel. O'Brien* v. *Maroney*, 423 F. 2d 865, 869-870 (C.A. 3).

Mr. Kessler's representation of petitioner throughout the trial was vigorous and knowledgeable. Contrary to petitioner's claim (Pet. 14), Mr. Kessler and Mr. Grusmark objected to the introduction of hearsay evidence against their respective clients, and they requested and were granted a cautionary instruction on the admissibility of hearsay evidence in a conspiracy (Tr. 94-96, 108-109, 123-124). Also, contrary to petitioner's claim, both Mr. Kessler and Mr. Grusmark objected to the introduction of co-defendant D'Orsay's post-arrest statement on a variety of grounds, and both counsel moved for a severance and a mistrial (Tr. 236-241, 244-246). Even if any of counsel's trial tactics could be considered errors of judgment, they are not sufficient to establish ineffective assistance of counsel. *McMann* v. *Richardson*, 397 U.S. 759, 770-771.

The trial record shows that Mr. Kessler had sole responsibility for petitioner's defense throughout the trial[3] (see, *e.g.*, Tr. 45, 70, 147, 172-190, 237,

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[3]Petitioner was represented by separate, private counsel at trial, and there was thus no reason, contrary to petitioner's contention (Pet. 17), for the court to inquire, *sua sponte*, whether counsel had a conflict of interest.

247-260, 386-393). Nevertheless, petitioner contends that Mr. Kessler did not act independently in not allowing petitioner to testify (Pet. Apps. E and F). Petitioner points nothing in the record that supports this claim. The decision not to testify was, we submit, a tactical decision of petitioner and his counsel Kessler, and, as such, does not establish ineffective assistance of counsel. See *United States* v. *Marcello,* 423 F. 2d 993, 1005 (C.A. 5), certiorari denied, 398 U.S. 959; *Sims* v. *Lane,* 411 F. 2d 661, 664-665 (C.A. 7), certiorari denied, 396 U.S. 943, and cases cited therein.

2. Petitioner contends that the evidence was insufficient to show either that he was a part of the conspiracy to import marihuana or that he aided and abetted another in the unlawful possession of a firearm during the commission of a felony.

a. The court of appeals reviewed the evidence, and found it sufficient to uphold the jury's verdict. There is no occasion for further review of this factual issue. Moreover, the evidence summarized at pages 2-4, *supra,* shows the existence of a conspiracy and petitioner's participation therein.

b. The evidence was also sufficient to support petitioner's conviction for aiding and abetting D'Orsay in carrying a firearm unlawfully during the commission of a felony.[4] D'Orsay was carrying the firearm while engaged in a conspiracy to import marihuana, which is a federal felony (Tr. 89-90, 92-93). The gun belonged

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[4]Petitioner received a one-year sentence for this offense, concurrent with the four-year sentence for violation of 21 U.S.C. 846 and 963. Consequently, if the conviction under the latter charge is valid, the Court need not consider the contentions with regard to the former charge. See *Benton* v. *Maryland,* 395 U.S. 784, 791; *Barnes* v. *United States,* 412 U.S. 837, 848, n. 16.

to petitioner (Tr. 217-218), who wanted it back at the completion of the illegal venture (Tr. 90). In light of these facts and the fact that petitioner was also a part of the conspiracy to import marihuana, the inference is overwhelming that petitioner gave D'Orsay the gun solely at the time of, and for use in, the conspiracy. Petitioner's knowledge of the illegal purpose for which D'Orsay intended to use the gun may be inferred from such circumstances. See *United States* v. *Calabro,* 467 F. 2d 973, 982 (C.A. 2), certiorari denied, 410 U.S. 926.

3. Petitioner contends that the trial court erred in failing to instruct the jury as to the meaning of "unlawfully" in the crime of carrying a gun unlawfully during the conspiracy. Petitioner, however, did not object to this failure to instruct at the trial, as required by Rule 30, Fed. R. Crim. P., and he may not now be heard to complain that the trial court's instructions were erroneous. *United States* v. *Atkinson,* 297 U.S. 157.

Furthermore, the alleged error is not so fundamental as to constitute plain error which may be considered even though not raised in the trial court. At least one Circuit has interpreted 18 U.S.C. 924 (c)(2) to require proof that carrying the firearm in itself was unlawful and to require an instruction so stating, at least where there was no evidence as to the lawfulness of the carrying. *United States* v. *Ramirez,* 482 F. 2d 807, 814 (C.A. 2). Here, however, the uncontradicted evidence showed that the carrying of the firearm by the principal, D'Orsay, was unlawful in itself, as a violation of 18 U.S.C. App. 1202(a)(1), since D'Orsay was a previously convicted felon (Tr. 292).

In order to convict for aiding and abetting, the evidence need show only that the principal committed an of-

fense and that the defendant aided and abetted him in doing so. *United States* v. *Deutsch,* 451 F. 2d 98, 118-119 (C.A. 2), certiorari denied, 404 U.S. 1019. The evidence showed that the principal, D'Orsay, carried the gun unlawfully during the conspiracy (Tr. 89-90, 92-93, 217-218, 292), which is an offense under 18 U.S.C. 924(c)(2). As previously shown, petitioner aided and abetted the commission of this crime by providing D'Orsay with the gun, which he knew would be carried in the conspiracy.

4. Petitioner attacks the composition of the grand and petit juries which indicted and convicted him, contending that they were improperly selected in that they excluded naturalized Cubans and young adults. These contentions were raised and fully answered in our memoranda in opposition in the companion case of *D'Orsay* v. *United States,* No. 73-5288, certiorari denied, December 3, 1973, and in *Crews* v. *United States,* No. 72-6021, certiorari denied, 411 U.S. 908, upon which we rely here.[5]

Petitioner also contends that he was denied due process because the composition of his juries was affected by 28 U.S.C. 1865(b)(1), which he contends is unconstitutional (Pet. 31). That provision requires federal jurors to have resided for one year within the judicial district in which they are to serve. In order to invalidate a jury selection plan, it must be shown that it excludes a "cognizable group" of persons, and not merely that it excludes some persons. See *United States* v. *Gast,* 969; *Grimes* v. *United States,* 391 F. 2d 709 (C.A. 5). Persons with less than one year's residence in a judicial district are no more cognizable as a group than are per-

[5]We are providing petitioner's counsel with these memoranda.

sons who choose not to register to vote, or persons between the ages of 18 and 21. The exclusion of such persons has been upheld. See *Grimes* v. *United States, supra; United States* v. *McVean,* 436 F. 2d 1120, 1122 (C.A. 5), and cases there cited.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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